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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1288**

State of Minnesota,
Respondent,

vs.

Michael Joseph McGowan,
Appellant.

**Filed August 6, 2012
Affirmed
Kalitowski, Judge**

Ramsey County District Court
File No. 62-CR-10-6058

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Michael Joseph McGowan challenges his conviction of third-degree sale of controlled substances, in violation of Minn. Stat. § 152.023, subd. 1(1) (2008), arguing that: (1) the district court violated his rights under the Confrontation Clause by admitting out-of-court statements of a co-conspirator; (2) the district court abused its discretion when it denied his request for access to a co-conspirator's rule 20-evaluation and psychological counseling records; (3) the district court abused its discretion by refusing to disclose the identity of a confidential reliable informant (CRI); (4) he was prejudiced by a police officer's improper character testimony; and (5) the evidence is insufficient to support the conviction. We affirm.

DECISION

I.

Appellant argues that the district court violated his Sixth Amendment right to confrontation when it admitted out-of-court statements by a co-conspirator, Erik Bader, that are captured on a recording of the undercover drug purchase. “[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews de novo.” *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

On May 28, 2010, Officer Kara Brecki was working undercover, posing as a drug purchaser at a St. Paul gas station. She observed Bader loitering outside of a gas station and instructed an accompanying CRI to ask Bader whether he could supply them with

drugs. After speaking briefly with the CRI, Bader approached Officer Breci in her vehicle and asked her what she needed. Officer Breci responded that she was looking for \$40 worth of crack cocaine. Bader borrowed Officer Breci's cellphone and called appellant. He asked if appellant could "hook him up," and they arranged to meet at a McDonald's restaurant on the other side of St. Paul.

At trial, the state sought to admit, over appellant's objection, a video and audio recording of the events that took place at the McDonald's. Officer Breci recorded the audio of her conversations with Bader using a hidden, on-body microphone. Another officer, hidden in a nearby surveillance van, filmed the transaction with a video camera. On the recording, when appellant arrived in the McDonald's parking lot, Bader can be heard telling Officer Breci, "I'll jump over there. . . . I'll, I'll bring ya it." The video then shows Bader meeting with appellant in appellant's vehicle. Their conversation was not recorded. When Bader returned to Officer Breci's vehicle, he handed her two baggies containing crack cocaine and said, "Okay, so this is what I got." The district court ruled that the recording was admissible against appellant as nonhearsay statements of a co-conspirator under Minn. R. Evid. 801(d)(2)(E), because the statements were made as part of a conspiracy between Bader and appellant to complete a drug sale. The court also ruled that their admission did not violate appellant's rights under the Sixth Amendment.

To admit out-of-court statements as co-conspirator nonhearsay, two things must be shown. First, the statements must satisfy the requirements of the co-conspirator exception to the hearsay rule, Minn. R. Evid. 801(d)(2)(E). *State v. Larson*, 788 N.W.2d 25, 36 (Minn. 2010). "Second, the introduction of the statements must not violate the

Confrontation Clause of the Sixth Amendment.” *Id.* Appellant does not dispute that Bader’s statements are admissible under rule 801(d)(2)(E), but argues that the admission of Bader’s declarations violated appellant’s rights under the Confrontation Clause.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The United States Supreme Court addressed whether the admission of a recorded statement of a nontestifying co-conspirator, which is otherwise admissible under Minn. R. Evid. 801(d)(2)(E), offends the Confrontation Clause in *Bourjaily v. United States*, 483 U.S. 171, 181-84, 107 S. Ct. 2775, 2782-83 (1987).

In *Bourjaily*, the government sought to admit a co-conspirator’s out-of-court statements in furtherance of a drug transaction. 483 U.S. at 174, 107 S. Ct. at 2778. Bourjaily argued that admission of the statements would violate his constitutional right to confront the witnesses against him because Bourjaily was unable to cross-examine the co-conspirator. *Id.* The Court held that when an out-of-court declaration of a co-conspirator meets the requirements for admissibility under Fed. R. Evid. 801(d)(2)(E), no independent Confrontation Clause analysis is necessary because the two standards for admissibility are “identical.” *Id.* at 182, 107 S. Ct. at 2782. The Court explained that “hearsay rules and the Confrontation Clause are generally designed to protect similar values,” *id.* at 182, 107 S. Ct. at 2782 (quotations omitted), and that the co-conspirator exception to the hearsay rule is “firmly enough rooted” under *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980), to dispense with any further inquiry into the

statement's reliability when it is admissible under Fed. R. Evid. 801(d)(2)(E). *Bourjaily*, 483 U.S. at 182-83, 107 S. Ct. at 2782.

In *State v. Brist*, the Minnesota Supreme Court considered whether *Bourjaily* remains good law in light of the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374 (2004). *Brist*, 812 N.W.2d at 56. *Crawford* altered the constitutional analysis for determining whether an out-of-court statement is admissible under the Confrontation Clause by expressly overruling *Roberts* and supplanting the *Roberts* analysis with a standard requiring a determination of whether an out-of-court statement is testimonial or nontestimonial in nature. 541 U.S. at 60-65, 68, 124 S. Ct. at 1369-1372, 1374. In determining that *Bourjaily* remains good law, *Brist* concluded that although *Crawford* cast doubt on *Bourjaily*'s reasoning, it did not overrule *Bourjaily*'s holding. 812 N.W.2d at 56-57.

Applying *Bourjaily* to facts nearly identical to those here, *Brist* affirmed the admission of a recorded, out-of-court co-conspirator declaration upon a Sixth Amendment challenge. *Id.* at 55-56. In *Brist*, a confidential police informant made five separate controlled buys of methamphetamine from *Brist*'s co-conspirator boyfriend, Johnny Garcia. *Id.* at 52-53. The district court admitted, under the co-conspirator exception, a recording of the first controlled buy in which Garcia said, "A quarter that she owes ya." *Id.* at 53. The informant testified that Garcia made the statement as he was handing methamphetamine to the informant, and explained that Garcia was referring to an earlier transaction in which *Brist* provided the informant with subpar methamphetamine. *Id.* Addressing *Brist*'s Sixth Amendment claim, the supreme court

concluded that Minnesota’s co-conspirator hearsay exception is “materially identical” to its federal counterpart. *Id.* at 55. Accordingly, because Garcia’s statement was admissible under Minn. R. Evid. 801(d)(2)(E), the court ruled it was also admissible under the Confrontation Clause. *Id.* at 55-56, 58.

Like *Brist*, this case involves a recorded, out-of-court statement by a co-conspirator, made to a government agent in furtherance of a criminal conspiracy, and satisfying the admissibility requirements of Minn. R. Evid. 801(d)(2)(E). Therefore, following *Brist* and *Bourjaily*, we conclude that no independent Confrontation Clause analysis was necessary here, and that the district court properly admitted Bader’s out-of-court statements.

In reaching our decision, we are mindful that the United States Supreme Court has not reaffirmed *Bourjaily* post-*Crawford*. *Id.* at 58 (Gildea, C.J., concurring) (arguing that the court should not ground its opinion on *Bourjaily* and affirming on the basis of *Crawford*). But even if the holding in *Crawford* undermines the rationale of *Bourjaily*, we conclude that Bader’s statements are also admissible under the *Crawford* analysis.

Crawford established that “testimonial” hearsay is inadmissible unless the declarant is shown to be unavailable and the accused had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. The *Crawford* court declined to “articulate a comprehensive definition” of testimonial statements. *Id.* at 68 n.10, 124 S. Ct. at 1374 n.10. Instead, the Court listed three formulations of testimonial statements:

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or

similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . ; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial

Id. at 51-52, 124 S. Ct. at 1364 (quotations omitted). These formulations “share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.” *Id.* at 52, 124 S. Ct. at 1364. But regardless of which definition is used, “*ex parte* testimony at a preliminary hearing” and “[s]tatements taken by police officers in the course of interrogations” are testimonial. *Id.* In addition, a testimonial statement “is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 51, 124 S. Ct. at 1364 (quotation omitted). Therefore, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.*

In *State v. Wright*, the Minnesota Supreme Court set forth a nonexclusive list of eight factors relevant to determining whether such statements are testimonial. 701 N.W.2d 802, 812-13 (Minn. 2005). Of these factors, “the central considerations are ‘the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner,’ in other words, ‘whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial.’” *State v. Scacchetti*, 711 N.W.2d 508, 513 (Minn. 2006) (quoting *State v. Bobadilla*, 709 N.W.2d 243, 250, 252 (Minn. 2006)). “[T]he other six factors are probative of those two.” *Id.* at 514.

Looking to the purpose for which Bader made the statements at issue here, the record demonstrates that Bader's statements are not testimonial. His declarations were made in an informal setting, not during a formal interrogation. Bader was unaware that Officer Brechi was a government agent and instead treated her as a drug buyer. In context, his comments were simply "casual remark[s] to an acquaintance" made with the purpose of facilitating a drug transaction, rather than solemn statements made with the purpose of assisting an investigation. *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. Moreover, Bader did not make his statements with an eye toward trial. *See Scacchetti*, 711 N.W.2d at 513. Therefore, Bader's statements are nontestimonial and their admission does not violate the Confrontation Clause.

II.

Appellant argues that the district court abused its discretion when it denied him access to Bader's rule-20 evaluation and refused to conduct in camera review of Bader's psychological counseling records. We review a district court's decision to limit a defendant's access to a witness's confidential files and records for an abuse of discretion. *State v. Reese*, 692 N.W.2d 736, 743 (Minn. 2005).

Medical records are generally protected from disclosure because of the physician-patient privilege. Minn. Stat. § 595.02, subd. 1(d), (g) (2006); *State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008). But the medical privilege "sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984). "[T]he proper procedure to follow in cases such as this is for the district court to review the medical records at issue in camera to determine whether the privilege

must give way.” *Evans*, 756 N.W.2d at 872. To be entitled to in camera review of confidential medical records, the defendant must first “make some plausible showing that the information sought would be both material and favorable to his defense.” *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quotations omitted). ““Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”” *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)).

Appellant sought disclosure of Bader’s records on the basis of an initial showing that Bader had been diagnosed with schizophrenia and an anxiety disorder, mental illnesses that appellant contended might diminish Bader’s credibility or impact his ability to perceive events. The district court granted appellant’s motion to review in camera the rule-20 evaluation, concluded that it contained no discoverable information, and denied appellant’s request for access to the evaluation. The court also denied appellant’s additional request for in camera review of the psychological records.

On review of this denial, this court may conduct its own independent review of the requested records to determine whether the district court abused its discretion. *See* Minn. R. Crim. P. 9.03, subd. 6 (permitting appellate review of record of district court’s in camera hearing); *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

Our review of the rule-20 evaluation reveals no information that is both favorable to appellant and material. Therefore, we conclude that the district court did not abuse its discretion by denying appellant’s request for access to the rule-20 evaluation. We also

conclude that the district court acted within its discretion when it denied appellant's request for in camera review of Bader's psychological records. The rule-20 evaluation provides a thorough current evaluation of Bader's competence to proceed as a criminal defendant, his competence to be held criminally liable for facilitating the drug transaction, and his ability to perceive the events at issue here. It therefore addresses the issues appellant raised in his initial showing. We conclude that additional record disclosures would be cumulative and unnecessarily intrusive of Bader's privacy interest.

III.

Appellant contends that the district court erred by refusing to disclose the CRI's identity. "We review a district court order regarding disclosure of a confidential informant's identity for an abuse of discretion." *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008).

The Minnesota Supreme Court has adopted four nonexclusive factors to consider when determining whether to order disclosure of a confidential informant's identity: (1) whether the informant was a material witness; (2) whether the informant's testimony will be material to the issue of guilt; (3) whether testimony of officers is suspect; and (4) whether the informant's testimony might disclose entrapment. *Id.* (citing *Syrovatka v. State*, 278 N.W.2d 558, 561-62 (Minn. 1979)). Ultimately, whether to disclose the informant's identity "remains a balancing test between the defendant's right to prepare a defense and the public's interest in effective law enforcement." *Rambahal*, 751 N.W.2d at 90. The burden is on the defendant to establish the need for disclosure. *Syrovatka*, 278 N.W.2d at 562. If the defendant fails to meet this burden but is able to establish a basis

for inquiry by the court, then the court should hold an in camera hearing to consider affidavits or to interview the informant in person. *State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982).

Appellant argues that the district court's refusal to disclose the CRI's identity or to hold an in camera hearing was an abuse of discretion because the CRI is a material witness who "actively participated in the underlying crime by enlisting Bader to act as a conduit between the police and appellant." He further contends that the details of the CRI's conversation with Bader would be helpful to his defense because they "could shed light on a number of unanswered questions" about Bader's involvement in the transaction or because the CRI may have observed the transaction from inside the McDonald's. We disagree.

The district court found that the CRI was not a material witness because his participation in the transaction was "minimal at best" and the CRI "was apparently able to establish one thing: that Bader could set up a drug buy." This finding is supported by the evidence. Officer Brecci testified that the CRI's conversation with Bader lasted just "[a] few seconds" before Bader approached Officer Brecci. This sequence of events leaves no opportunity for Bader to have revealed to the CRI additional material facts suggested by appellant, like whether Bader possessed cocaine but was unwilling to part with it, whether he expected to be compensated for acting as a broker, or whether he knew Officer Brecci to be a police officer.

The district court also correctly concluded that appellant failed to show that disclosure of the CRI's identity would be helpful to his defense. The CRI's fleeting

participation in the drug transaction does not, by itself, render the CRI's testimony helpful to appellant. *See id.* ("That the informant may have been involved in some way early in the conspiracy, either as a participant or as a witness, does not mean that the informant's testimony was material to the defense."). And appellant's arguments that the CRI "could shed light on a number of unanswered questions" or that the CRI might have witnessed the drug transaction from inside McDonald's are speculative at best.

Appellant makes no argument that either of the last two *Syrovatka* factors—credibility of the officer's testimony or entrapment—favors disclosure here. And because appellant did not challenge Officer Breci's version of events at trial or introduce any evidence that he was entrapped, neither factor supports disclosure. Because appellant failed to show that the CRI's identity was necessary for his defense and the state has an ongoing interest in preserving the CRI's confidentiality, the district court properly denied appellant's request for disclosure or an in camera hearing.

IV.

Appellant argues that Officer Breci's testimony at trial contained improper character evidence, the admission of which deprived him of a fair trial. As a general rule, testimony from which the jury can infer that a defendant has committed prior crimes is inadmissible. Minn. R. Evid. 404(b) ("Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith."); *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974).

During Officer Breci's testimony at trial, she described appellant's arrival at the McDonald's prior to the drug transaction as follows:

OFFICER BRECI: I could see that it was a black male with a white tee-shirt that was driving the vehicle.

PROSECUTOR: Okay. What happened after that car parked?

OFFICER BRECI: Mr. Bader—I asked Mr. Bader if I could get out and talk to the male, and he said, “No, he doesn’t do that.” He said, “He doesn’t come to us.”

Appellant objected and, after an off-the-record discussion, the district court sustained the objection. The record does not reveal whether a curative instruction was requested, but none was given.

Appellant contends that Officer Brecci’s testimony was improper because it suggested “that appellant was a habitual crack dealer.” We agree with appellant that the admission of improper character evidence is error regardless of whether the prosecutor intentionally elicited the offending testimony. *See State v. Holbrook*, 305 Minn. 554, 557-58, 233 N.W.2d 892, 895 (1975) (labeling intentional and unintentional elicitation of improper character evidence as “erroneous”); *Richmond*, 298 Minn. at 563, 214 N.W.2d at 695-96 (labeling as “error” admission of unintentionally elicited testimony suggesting that defendant had a prior record).

But even if this testimony constituted error, we conclude that it was harmless beyond a reasonable doubt. “The test of harmless error beyond a reasonable doubt is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *State v. Butenhoff*, 484 N.W.2d 60, 63 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. May 15, 1992). When determining whether the admission of erroneous evidence is harmless beyond a reasonable doubt,

the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant. Overwhelming evidence of guilt is a factor, often a very important one, in determining whether, beyond a reasonable doubt, the error has no impact on the verdict. But the court cannot focus on the evidence of guilt alone.

State v. Al-Naseer, 690 N.W.2d 744, 748 (Minn. 2005) (quotations and citations omitted).

Here, Officer Breci's testimony was unlikely to affect the jury. The allegedly improper comment was brief and was intended to explain how the drug transaction unfolded, rather than to establish appellant's propensity for dealing drugs. The prosecutor did not reference the comment during closing arguments. Appellant countered the testimony with his own testimony on direct examination that he is not a drug dealer. And the evidence of appellant's guilt was strong.

In addition, the Minnesota Supreme Court "has attached importance to whether the prosecutor intentionally elicited" the inadmissible prior-bad-acts testimony. *Holbrook*, 305 Minn. at 557-58, 233 N.W.2d at 895; *see State v. Barness*, 294 Minn. 507, 508, 200 N.W.2d 300, 301 (1972) (suggesting that a new trial would be warranted if inadmissible prior-bad-acts testimony was intentionally elicited, but affirming because "there was no showing that the prosecutor anticipated the answer he received, and we are satisfied it was volunteered without any knowledge on his part that it was forthcoming"). Here, the prosecutor's question, "What happened after that car parked?" was not calculated to elicit testimony pertaining to appellant's prior criminal acts. *See State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985) (stating that "unintended responses under unplanned

circumstances ordinarily do not require a new trial”). Therefore, we conclude that Officer Brecci’s testimony does not warrant a new trial.

V.

Finally, appellant contends that the evidence is insufficient to support the conviction. In considering a claim of insufficient evidence, our review is “limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court

will not disturb the verdict if the jury, while acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense, given the facts in evidence and the legitimate inferences that could be drawn therefrom.

State v. Crow, 730 N.W.2d 272, 280 (Minn. 2007).

A person is guilty of third-degree controlled substance crime if “the person unlawfully sells one or more mixtures containing a narcotic drug.” Minn. Stat. § 152.023, subd. 1(1). “A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2008). Here, the state introduced no direct evidence that appellant provided the drugs Bader sold to Officer Brecci. Instead, the state’s case rested on circumstantial evidence requiring the jury to infer that appellant had provided the drugs to Bader while the two met in appellant’s car.

Circumstantial evidence is “entitled to the same weight as direct evidence.” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). “Convictions based on circumstantial evidence alone may be upheld . . . [But] convictions based on circumstantial evidence warrant particular scrutiny.” *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (quotation omitted). We apply a two-step process to evaluate the sufficiency of circumstantial evidence to support a conviction. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, we identify the circumstances proved, and in doing so “we defer . . . to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *Id.* Second, we independently examine “the reasonableness of all inferences that might be drawn from the circumstances proved,” including “inferences consistent with a hypothesis other than guilt.” *Id.* “[A] conviction based on circumstantial evidence may stand only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt.” *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). “To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than his guilt.” *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010).

Here, the state proved the following circumstances. On May 28, 2010, a CRI approached Bader with instructions from Officer Brecki to determine whether Bader could sell drugs or facilitate a drug purchase. The CRI had a brief conversation with Bader,

who appeared responsive and immediately approached Officer Brechi to ask what she was looking for. Officer Brechi told Bader she was looking for \$40 worth of crack cocaine. Rather than immediately offering Officer Brechi crack cocaine, Bader used Officer Brechi's phone to call appellant. Over the phone, Bader asked appellant if he could "hook him up," and the two arranged to meet. Appellant arrived at the designated meeting place shortly thereafter. Officer Brechi gave Bader \$40 to complete the purchase, and Bader proceeded to appellant's car where he remained for approximately two minutes. Bader returned to Officer Brechi's car and Officer Brechi asked him "Did you get it?" Bader responded, "Okay, so this is what I got," and handed Officer Brechi two baggies containing a total of .28 grams of crack cocaine. Bader told Officer Brechi that the crack was "littler ones from what [he] normally get[s]" and that he had asked appellant if he could "have another one." Officer Brechi then approached appellant's car to ask him if she could contact him "straight out next time" if the drugs were of good quality, and appellant told her she could. When Officer Brechi and appellant finished exchanging phone numbers, appellant exited the parking lot in a suspicious manner in which he first headed east on University Avenue, then backtracked through the parking lot and exited onto southbound Snelling Avenue. Police officers then conducted a "soft stop" of appellant's vehicle to confirm his identity, but did not arrest him at that time. The state also introduced testimony establishing that it is common in the drug trade for one person to act as a broker or middleman for the ultimate dealer.

Appellant argues that, under Minn. Stat. § 634.04 (2010), the evidence is insufficient to corroborate Bader's recorded statements implying that appellant supplied

the crack cocaine. Section 634.04 provides, “A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.”

We question whether Bader’s recorded, out-of-court statements fall within the category of “testimony” to which section 634.04 applies. Applying section 634.04 here would not serve its credibility-related rationale, because Bader was unaware he was dealing with law enforcement when he made the recorded statements. *See State v. Azzone*, 271 Minn. 166, 170, 135 N.W.2d 488, 493 (1965) (stating that the object of the accomplice-corroboration requirement “is to provide a check upon the credibility of testimony of a person who, having been admittedly involved in criminal conduct, might be disposed to shift or diffuse responsibility in order to curry the favor of law enforcement officials”).

But even if section 634.04 applies here, the record contains ample circumstantial evidence corroborating Bader’s suggestion that appellant supplied the drugs, including the phone call from Bader to appellant, the arranged meeting, appellant’s offer to allow Officer Brechi to contact him for drugs in the future, and appellant’s suspicious driving after the transaction.

We also reject appellant’s argument that the evidence does not exclude the possibility that he refused to sell Bader drugs and that it was Bader who actually provided the drugs. At trial, appellant testified that he went to the McDonald’s with the intent to help Bader obtain drugs, but that he “terminated the whole situation” when he learned

“who [Bader] was dealing with.” According to appellant, Bader then pulled two baggies out of his pocket and asked appellant if he thought Officer Brecci “would go for these.” Appellant contends that the circumstances proven do not rationally exclude his version of events because the record does not contain direct evidence of guilt that is typically present in a controlled-buy case, such as a tape recording of the conversation in which the drug purchase was arranged or completed, searches of the accomplice before and after the transaction, or the recovery of marked buy money.

But appellant’s scenario is not rational in light of the evidence as a whole. Bader went to the trouble of locating a willing seller and arranging a transaction that required him to accompany Officer Brecci across town. These actions are inconsistent with someone who possessed the type and amount of drugs that Officer Brecci requested. Appellant’s explanation is also contradicted by Bader’s statements to Officer Brecci that indicate that he had obtained the drugs from appellant. And finally, it strains credulity that appellant would agree to allow Officer Brecci to contact him directly for future drug purchases if he had just refused to participate in a transaction because he did not trust her.

Because the record excludes all rational inferences inconsistent with appellant’s guilt, the evidence supports the conviction.

Affirmed.